

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

3 CASE NO. 8-16-75545-reg

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5 In the Matter of:

6

7 DOWLING COLLEGE,

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9 DEBTOR.

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11 United States Bankruptcy Court

12 Long Island Federal Courthouse

13 290 Federal Plaza

14 Central Islip, New York

15

16 July 10, 2017

17 1:40 PM

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19 B E F O R E:

20 HON. ROBERT E. GROSSMAN

21 U.S. BANKRUPTCY JUDGE

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1 HEARING Matter: (74) ADJ Order Scheduling Initial Case
2 Management Conference
3

4 HEARING Matter: (31) Final ADJ Order to Schedule Emergency
5 Hearings on (9) Motion for Authority to Obtain Credit Under
6 Section 364(b), Rule 4001(c) or (d) to Obtain Post-Petition
7 Secured, Super Priority Financing Pursuant to 11 U.S.C.
8 Sections 105, 361, 362, 363 and 364 and (B) to Utilize Cash
9 Collateral Pursuant to 11 U.S.C. Section 363; Adequate
10 Protection to Pre-petition Secured Creditors Pursuant to 11
11 U.S.C. Sections 361, 362, 363 and 364 by Joseph Charles Corneau
12 on behalf of Dowling College
13

14 HEARING Matter: (317) Motion to Sell Property of the Estate
15 Free and Clear of Liens under 11 U.S.C. 363(f); Approving
16 Procedures for the Sale of Certain Assets Free and Clear of
17 Liens, Claims and Encumbrances and Authorizing the Employment
18 and Compensation of Tiger Capital Group, LLC as Liquidation
19 Agent by Lauren Catherine Kiss on behalf of Dowling College.
20 Motion withdrawn as per letter on Docket No. 361
21

22 HEARING Matter: (344) Second Motion to Extend Exclusivity
23 Period for Filing a Chapter 11 Plan and Disclosure Statement by
24 Lauren Catherine Kiss on behalf of Dowling College
25

1 HEARING Matter: (345) Motion to Sell Property of the Estate
2 Free and Clear of Liens under 11 U.S.C. 363(f) Pursuant to
3 Sections 105(a) and 363 of the Bankruptcy Code with regards to
4 Furniture and Equipment located at the Oakdale Campus to
5 Princeton Education Center LLC Free and Clear of All Liens,
6 Claims and Encumbrances by Lauren Catherine Kiss on behalf of
7 Dowling College

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9 HEARING Matter: (347) Motion to Approve and Authorize
10 Procedures for the Turnover of the Debtor's Federal Perkins
11 Loan Portfolio by Lauren Catherine Kiss on behalf of Dowling
12 College

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25 Transcribed by: Sheila Orms

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P R O C E E D I N G S

(Call to Court)

THE COURT: Good afternoon. Please be seated.

THE CLERK: The matter is 59 through 64, Dowling College.

MR. SOUTHARD: Good afternoon, Your Honor, Sean Southard, Klestadt Winters Jureller Southard & Stevens on behalf of Dowling College, Debtor in Possession.

MR. MCCORD: Good afternoon, Your Honor, Certilman Balin, by Richard McCord, ACA Financial Guaranty Corp and on the phone is Brian Pfeiffer also for ACA Financial Guaranty Corp.

MR. YANG: Good afternoon, Your Honor, Stan Yang, for the United States Trustee.

MR. FRIEDMAN: Good afternoon, Your Honor, Ronald Friedman, SilvermanAcampora LLP.

MR. HAMMEL: Good afternoon, Your Honor, Ian Hammel and Adam Berkowitz on behalf of the UMB as trustee.

MR. KLEINBERG: Howard Kleinberg, Meyer Suozzi for the Dowling Board of Trustees.

MR. KNAPP: James Knapp, Assistant United States Attorney for the Department of Education, good afternoon, Your Honor.

THE COURT: Who's on the phone?

THE CLERK: Please state your phone appearance.

1 MR. PFEIFFER: Good afternoon, Your Honor, Brian
2 Pfeiffer from White & Case LLP for ACA Financial.

3 THE COURT: Okay.

4 MR. SOUTHARD: Good afternoon again, Your Honor, Sean
5 Southard for the record on behalf of Dowling.

6 Your Honor, we have a few different matters on this
7 afternoon's calendar. I guess first off, there is a continued
8 status conference in the case that's on the calendar for this
9 afternoon in no particular order, Your Honor, I thought we
10 would give Your Honor an update on a few different matters.

11 With regard to the Oak Hill Campus sale, which we
12 were before Your Honor a very short while ago, we continue to
13 prepare for a closing with NSF Capital. We met with NSF and
14 its representative after the last hearing before Your Honor to
15 discuss transition matters and appropriate closing activity.

16 We are still under the impression that we are
17 targeting on or about August 15th closing date, and we are
18 awaiting at this point, the newly formed designee entity that
19 we would insert into the proposed order and then submit to Your
20 Honor.

21 With regard to the Brookhaven Campus, the planning
22 discussions continue among the debtor's advisors, as well as
23 town representatives, and the parties continue to discuss the
24 marketing -- the appropriate timing for marketing and ultimate
25 disposition of those properties.

1 Hopefully we hope we'll be back in front of Your
2 Honor soon with a better proposed timeframe for that
3 disposition, but that is about all I have at the moment to
4 report.

5 Your Honor, in terms of the Warren Act's (ph)
6 litigation, which Your Honor last entered an order appointing a
7 mediator, that mediation, the first session of that mediation
8 is scheduled to take place tomorrow.

9 THE COURT: Don Juron (ph) is the mediator in that?

10 MR. SOUTHARD: Yes, Your Honor. We will be mediating
11 at his office, and tomorrow the first day if we need it, we
12 will continue to the following day as the first two scheduled
13 mediation dates.

14 Your Honor, the claims review and analysis continues
15 on the debtor's side, as well as, you know, the creditor's
16 committee has done some of their own claims analysis. And in
17 terms of upcoming motions or items that we would ask Your Honor
18 to consider next, Stonybrook University desires to continue
19 leasing its -- the dorm facility that's located at the
20 Brookhaven campus for the next academic year.

21 THE COURT: It's currently leased to Stonybrook?

22 MR. SOUTHARD: Yes, Your Honor. As of the petition
23 date, Stonybrook, basically its students, resided at the dorm
24 at the Brookhaven campus under a prepetition lease. Stonybrook
25 desires to continue that relationship, essentially on the same

1 terms for another academic year.

2 The debtor in consultation with various creditor
3 parties is prepared to amend and extend that prepetition lease,
4 to provide for that additional period of time. And my
5 understanding is that the creditors are agreeable to that. So
6 that's a matter that we would ask Your Honor to consider as
7 soon as we're able and we'll be looking for a hearing date from
8 chambers on that in the next couple of weeks ideally subject to
9 Your Honor's availability.

10 Your Honor, in addition, the debtor does expect to
11 retain a consultant to assist with the collection of accounts
12 receivable. These -- the terms I think are going to be
13 contingency based and not significant in order or magnitude but
14 nonetheless we would require retention for that proposed agent.

15 And then finally, another retention, Your Honor, we
16 would propose to retain the Baker Tilly accounting firm to
17 assist with the accounting work related to the Title IV close-
18 out, the federal loan programs and the accounting that is
19 necessary to in essence provide the Department of Education
20 with final numbers associated with both the direct loan program
21 as well as the Perkins loan program, which is a motion that's
22 on before Your Honor today.

23 THE COURT: Does Dowling itself -- has Dowling itself
24 loaned money or is all the money loaned through the federal
25 program?

1 MR. SOUTHARD: The -- certainly in terms of direct
2 loans, which is the largest piece, those are direct loans by
3 the government to the students. It's not Dowling. Dowling
4 only serves in an administrative capacity to assist the
5 financial aid.

6 With regard to the Perkins loan which is on before
7 Your Honor today, there is somewhat of a nuance there because
8 the original program when it was set up back in I think the
9 late '60s if memory serves, provided that both the government
10 would seed a fund, and then the institution Dowling also seeded
11 a smaller portion, but nonetheless contributed to a fund to
12 then loan.

13 And the idea of the program is that it is a revolving
14 program and Dowling as agent collects on the loans as they come
15 due, and then that same pot of money is loaned out again to
16 future students.

17 So we can talk about that one now or we can talk
18 about it when we get to it on the agenda, but I can explain in
19 more detail to Your Honor exactly where that stands.

20 So that is all I have for the brief status update,
21 Your Honor, unless any other party or Your Honor had any
22 questions, I'd be happy to move on.

23 THE COURT: Anybody else?

24 (No response)

25 THE COURT: Okay.

1 MR. SOUTHARD: Okay. Thank you, Your Honor.

2 So the first item we have on the proposed agenda for
3 this afternoon is the debtor's second motion for an order
4 extending the exclusive periods, during which the debtor may
5 file.

6 A Chapter 11 plan and solicit acceptances, that is
7 Docket No. 344, Your Honor, and no objection were filed. The
8 debtor's initial exclusive periods were set to expire on March
9 29th and May 30th respectively and Your Honor previously --

10 THE COURT: Yeah, I'll extend it because I'm not
11 really certain whether you can have a contested plan and a not
12 for profit. I've been trying to figure that out and I can't
13 figure out how that would happen. So unless anybody objects,
14 to the extent to the exclusive period, I don't think anybody
15 can file anything anyway and you can't be a 7. So the only
16 thing you've got left is your plan.

17 MR. SOUTHARD: Thank you, Your Honor. We -- there
18 are no objections, so I think the parties are prepared --

19 THE COURT: All right.

20 MR. SOUTHARD: -- to consent to that. We will submit
21 that order.

22 Your Honor, the second item on the calendar again
23 unopposed this morning or this afternoon is the debtor's motion
24 for an order approving and authorizing procedures for the
25 turnover the debtor's federal Perkins loan portfolio. That's

1 Docket No. 347. Mr. Knapp is here on behalf of the Department
2 of Education this morning and -- or this afternoon. And, Your
3 Honor, essentially back beginning in 1969 and as part of its
4 operations as an institution of higher education, the debtor
5 participated in and made loans to students in accordance with
6 the federal Perkins loan program.

7 That program is comprised of the following two
8 components, as it relates to the debtor. And that is student
9 loans which as of May 31st of this year, the debtor held
10 approximately 717 loans totaling approximately 1.65 million in
11 aggregate outstanding balance.

12 And then secondly, a student loan funds, which as of
13 May 31st, 2017 totaled approximately 414,000. And those funds
14 are held in two of the debtor's bank accounts, one of which
15 Your Honor had previously frozen as a restricted account in
16 relation to the first day motions that the debtor filed.

17 So two components, loan portfolio with outstanding
18 loans and then cash.

19 THE COURT: Is there anything property of the estate?

20 MR. SOUTHARD: So, Your Honor, we have determined
21 that with regard to the loan portfolio we don't think so. And
22 -- as we outlined in the motion, the Department of Education
23 when under its rules and procedures under the Higher Education
24 Act, once it learned that Dowling was losing its accreditation
25 effective as of the end of August 2016, it sent a notice and

1 demand for the surrender of the Perkins loan portfolio because
2 per their procedures, the debtor lost its ability to continue
3 participating in the Perkins loan program.

4 And the procedures provide basically that Dowling
5 once it loses its ability to participate in Title IV is not a
6 proper party for continued collection of loans or administering
7 of the Perkins loan program.

8 THE COURT: Well I --

9 MR. SOUTHARD: So --

10 THE COURT: Okay. Hold it, hold it, hold it. You
11 have a million dollars outstanding of loans let's say, pick any
12 number. Every month a student pays, ex-student or student pays
13 that loan, right?

14 MR. SOUTHARD: Yes, Your Honor.

15 THE COURT: Who's the money paid to?

16 MR. SOUTHARD: The money is paid to Dowling is my
17 understanding.

18 THE COURT: Okay. So every month Dowling gets in X
19 dollars and then loans it out again or what?

20 MR. SOUTHARD: In theory, yes. When the program
21 continues, but --

22 THE COURT: So if the merry-go-round stops, why isn't
23 the money that's being repaid Dowling's money?

24 MR. SOUTHARD: Because of the rules and procedures
25 under applicable federal law.

1 THE COURT: Well, I mean, I understand the government
2 wants to take the money and loan it out to other students and
3 that may be a noble exercise, why doesn't that money go to the
4 creditors of Dowling? If the money started with Dowling?

5 MR. SOUTHARD: Well, again, only a portion of the
6 money started with Dowling in terms of --

7 THE COURT: Where did the rest of the money come
8 from?

9 MR. SOUTHARD: The federal government.

10 THE COURT: Dowling borrowed it from the government
11 to loan to the kids?

12 MR. SOUTHARD: No. The way it starts back in 1969 is
13 there's a seeding of a pot of money that would be the loan, the
14 corpus of the loan, right, so that the government seeded the
15 largest portion of that fund. And Dowling likewise contributed
16 --

17 THE COURT: What portion did Dowling seed?

18 MR. SOUTHARD: I -- we don't have precise numbers as
19 of today, Your Honor. But I believe the last reported numbers
20 are something in the neighborhood of 70 to 30.

21 THE COURT: 70 Government?

22 MR. SOUTHARD: Initially 85/15.

23 THE COURT: Which way?

24 MR. SOUTHARD: 85 for Government.

25 THE COURT: Okay.

1 MR. SOUTHARD: 15 Dowling.

2 THE COURT: So why wouldn't a dollar today be divided
3 85/15?

4 MR. SOUTHARD: Because the procedures provide that we
5 lose our interest in the portfolio and we're to assign it back
6 to the Government.

7 THE COURT: Could be a lot of procedures that change
8 when somebody files bankruptcy. I mean, do they have a secured
9 interest?

10 MR. SOUTHARD: They do not, Your Honor.

11 THE COURT: Well, basically what you're doing --

12 MR. SOUTHARD: They assert it's a trust fund. They
13 assert that those loans --

14 THE COURT: So the money is kept in a trust account?
15 No.

16 MR. SOUTHARD: Well, yes, there is a segregated
17 account which is --

18 THE COURT: And Dowling is then the trustee?

19 MR. SOUTHARD: I believe the procedures require and
20 state that they're held in a trust. These are the arguments,
21 and let me take a step back, Your Honor. We saw I think the
22 same issues that Your Honor is thinking about today relative to
23 property of the estate being a very broad concept, and we
24 discussed those views with the Department of Education, with
25 the U.S. Attorney's Office and they provided us with a

1 subsequent demand and cited to procedures which we then put in
2 our motion, which after consideration and investigation, we
3 felt with regard to the loan portfolio they have the better
4 argument than we did.

5 And with regard to --

6 THE COURT: Well, you're not talking about relevant
7 to the size of this estate, potentially an insignificant amount
8 of money. And I'll go along with what you guys want to do if
9 somebody can show me a legal principal that you're right, or
10 even if what the argument is. It doesn't appear. It appears
11 the Government wants the money, and I don't fault them.
12 Because they're going to loan it out hopefully to more kids.

13 But Dowling's creditors are saying, X dollars have
14 been used of this estate's money, kids are paying back that
15 money, why don't we get it. Apparently nobody is saying that
16 because nobody's objecting to what you're wanting to do.

17 MR. SOUTHARD: Well, no one was objecting, Your
18 Honor.

19 THE COURT: Huh? If people want to tell me they
20 waive that and the committee or others say we don't care, tell
21 me.

22 MR. SOUTHARD: Your Honor, Mr. Friedman points out to
23 me the second part of the asset class that we're discussing
24 here at the outset. We have the loans, the one portfolio, the
25 outstanding loans that you and I have been discussing, and then

1 in addition to that, there's the pot of money that exists,
2 which are in essence, collected proceeds from these loans.

3 There is a --

4 THE COURT: You know, intellectually I wouldn't see
5 any difference. If the Government believes that it's their
6 money, whether it's sitting in an account today or will be
7 collected tomorrow, the Government can speak for itself. I
8 assume they would take the same position, unless they waive
9 that and say, if you've already collected it, it's yours.

10 MR. SOUTHARD: With regard to the fund of money, what
11 our obligation under the rules again provide that we are to
12 account, Dowling is to account to the Government --

13 THE COURT: Fine.

14 MR. SOUTHARD: -- for those funds, and once that
15 accounting is complete, it is possible that a portion of those
16 funds will be determined to be Dowling's and we would keep that
17 portion at the end of the day.

18 That's with regard to the collected funds, not with
19 regard to the loan portfolio, which again is under the
20 procedures --

21 THE COURT: But I'm missing the difference. I
22 understand the two tranches, but I'm missing the intellectual
23 difference between monies to be collected and monies have been
24 collected.

25 MR. SOUTHARD: My understanding is as follows.

1 Because we're in a liquidation and we will not go on forever as
2 an institution, it is --

3 THE COURT: I got that, I understand. Their position
4 is when the merry-go-round stopped, you can no longer loan
5 money, therefore, all those funds should go back to the
6 government to loan back to other people, I understand that.

7 All I'm asking is why is that true in a bankruptcy if
8 a portion of the funds to be collected truly belong to the
9 debtor. The government can take its 85 cents and go in and do
10 as it chooses, and yes, if you were not in bankruptcy they may
11 have mechanisms to force those funds, but you are.

12 And somebody's got to establish, other than the fact
13 the government wants it why they have a right to it, or b) all
14 of you guys tell me, you give up, you don't care.

15 MR. SOUTHARD: I can't speak --

16 THE COURT: And they can have it.

17 MR. SOUTHARD: I can't speak for the other creditors,
18 so.

19 THE COURT: Yeah, I mean, either one of those
20 scenarios is okay with me, but I'm not going to sign an order
21 divesting the estate of monies that may belong to it because
22 somebody comes in and says I want it. They may be right, they
23 may -- we can litigate it, they may be wrong, but it wouldn't
24 be the first time people have exercised using power to try to
25 get assets that don't necessarily belong to them.

1 MR. SOUTHARD: Yes, Your Honor.

2 MR. KNAPP: Your Honor, we're going to have to brief
3 this, we're going to have to ask for some time to brief it.

4 THE COURT: Yeah, I agree with that. But I just need
5 some basis other than we want it, and we want to rotate it back
6 into the system. If Dowling has a property right to some of
7 this money and then its estate has that right. You can then
8 say we don't want to fight the litigation, they can do any
9 number of things, but there has to be -- I have to make a
10 finding and say how you got it. That's all. I'm not saying
11 you don't get it --

12 MR. KNAPP: I understand.

13 THE COURT: -- I'm not saying it's not a noble
14 exercise for you to get it and loan it out again. But I -- the
15 Court has its obligations under the law and there are many,
16 many creditors, not here today, that may have a right to some
17 of that money. And the estate at this point is not so flush
18 that it should be throwing some money around.

19 MR. KNAPP: Understood, Your Honor.

20 THE COURT: All right. It doesn't mean who's going
21 to win or lose. And if you can do the rest of this without
22 divesting the money, if you want to, you know, give them all
23 rights other than the money and put the money -- collect the
24 money and leave it till we figure out what to do with it, I'm
25 not trying to delay anything here.

1 MR. SOUTHARD: Understood, Your Honor. The
2 procedures as you might imagine, their regulations are dense
3 and specific in terms of requirements, but one of the things
4 that we have most recently been discussing with the Department
5 of Education is a request to relax some of the standards of
6 audit and accounting that are applicable to the wind down of
7 these programs. And that dovetails into the rather large claim
8 that the government filed.

9 THE COURT: Let me ask, if the government found an
10 impropriety in something, do you go after individuals on these
11 loans?

12 MR. KNAPP: Fraud in the --

13 THE COURT: Something -- if there was some
14 impropriety in the handling of the funds by the school, would
15 the government have claims against anyone but the school, any
16 individuals, or anything?

17 MR. KNAPP: That's a complex question I'm not
18 prepared to answer.

19 THE COURT: All right. Okay.

20 MR. SOUTHARD: That said, Your Honor, I think the
21 suggestion of potentially working to liquidate this according
22 to the government's procedures and maybe leave the ultimate
23 reckoning of property of the estate entitlements to a later day
24 is a wise suggestion that we'll discuss further with the
25 Department of Education.

1 THE COURT: They have their rules.

2 MR. SOUTHARD: They do, many of them.

3 Thank you, Your Honor. So I would propose to adjourn
4 that motion subject to conferring with the Department of
5 Education about additional pleadings perhaps to be filed before
6 Your Honor.

7 THE COURT: Okay.

8 MR. SOUTHARD: Your Honor, the next item on the
9 calendar this morning or this afternoon is the debtor's motion
10 to sell the furniture and equipment located at the Oakdale
11 Campus and the supplement to that motion which we filed late
12 last week.

13 Your Honor, when the motion was originally filed
14 Princeton Education Center was the contemplated purchaser of
15 the Oakdale Campus. And the debtor had entered into a purchase
16 agreement with Princeton for the sale of the furniture and
17 equipment that's located at the Oakdale Campus for \$90,000.

18 Your Honor will also recall that at one point the
19 debtor had filed a motion seeking to retain a liquidation agent
20 associated with the furniture and equipment at the same campus,
21 and that motion has been subsequently withdrawn due to this
22 pending proposed sale.

23 That said, between the time we filed the motion
24 originally and now, we have a new proposed purchaser or a back-
25 up bidder, NCF Capital.

1 THE COURT: Are they going to do it under the same
2 terms?

3 MR. SOUTHARD: They are doing it on the same terms,
4 Your Honor. And that was the point of our supplement to that
5 motion filed last week, was essentially to lay that out.

6 THE COURT: So withdrawing the Tiger motion --

7 MR. SOUTHARD: Yes, Your Honor, that's been
8 effectively withdrawn.

9 THE COURT: -- and you want me to approve the same
10 terms to NFC whereby they only have to close if they close on
11 the proper.

12 MR. SOUTHARD: Yes, Your Honor.

13 THE COURT: There's no objections to that?

14 MR. SOUTHARD: There are no objections.

15 THE COURT: All right. I'll grant a) the motion to
16 approve the sale to NFC under those conditions, and you're just
17 withdrawing the Tiger motion.

18 MR. SOUTHARD: Yes, Your Honor.

19 THE COURT: So we'll withdraw that motion and so
20 order a record on that.

21 MR. SOUTHARD: Thank you, Your Honor.

22 Your Honor, that brings us I believe to the last
23 matter on the calendar this afternoon, and that is the debtor's
24 continued motion to approve its use of cash collateral and DIP
25 financing. And Your Honor will recall many discussions on

1 these --

2 THE COURT: This reminds me of a Monty Python movie.
3 I cut both legs off and one warm, and you guys keep coming back
4 and saying get back you.

5 MR. SOUTHARD: Merely a flesh wound, Your Honor.

6 So we are back here, Your Honor, in relation to a
7 proposed final order that was filed and noticed on the docket a
8 couple of weeks back. And, Your Honor, among other things, the
9 final order resolves the committee's objection to DIP financing
10 and use of cash collateral through terms that are set forth on
11 a term sheet that's attached to that proposed final order.

12 THE COURT: Final order is your version of a 9019
13 basically. That's what you're -- that's what this is all
14 about. The committee says yes to everything that's in the
15 first part, which is the DIP loan. The DIP lender says yes to
16 the committee and therefore there are no objections. Is that -
17 -

18 MR. SOUTHARD: Your Honor, that's a pretty decent
19 summary.

20 THE COURT: Only took me 40 years to learn all that
21 stuff. Look, I don't want people spending enormous amounts of
22 money on -- administratively on this case. What you've put is
23 everybody's waiving everything against everybody, articulate
24 sentence. In return, the committee has negotiated the benefit
25 of unsecured creditors pay-outs which probably violate Jevick

1 (ph) but they negotiated.

2 This is what Jevick said don't do. We all know that,
3 or at least I hope you do. Now, it also depends is there are
4 classes in the waterfall who would be getting less or not paid
5 if the committee steps in the spot it wants to, which is after
6 all certain costs and certain amounts are paid back to the
7 secured creditors in each tranche, and then money goes to the
8 unsecureds.

9 Are there any priority -- depending on how the Warren
10 Act class action comes out, will they be priority claims?

11 MR. SOUTHARD: So, Your Honor, there are priority
12 claims that will be allowed in this case.

13 THE COURT: And they'll get paid ahead of the
14 unsecureds in each tranche?

15 MR. SOUTHARD: Yes, Your Honor. This is not a --
16 this is not violative of Jevick in the same manner that I think
17 the Jevick case dealt with. So we're not skipping a priority
18 here as I understand the proposed framework, rather --

19 THE COURT: The term sheet has -- I didn't see
20 priority claims ahead of the unsecureds in its -- in their
21 initial payments in each class.

22 MR. SOUTHARD: So, Your Honor, the term sheet, such
23 as it is, is expected to ultimately be in the form of a
24 liquidating plan voted on by creditors and I think with regard
25 --

1 THE COURT: If I sign an order today is that term
2 sheet now binding on creditors?

3 MR. SOUTHARD: I -- from the debtor's perspective I
4 believe that creditors still have the opportunity to vote on
5 the plan because the term sheet --

6 THE COURT: Well, they have to have an opportunity to
7 vote, but the question is --

8 MR. SOUTHARD: I think the --

9 THE COURT: -- am I collaterally estopped? If you
10 have an order approving this -- the DIP financing with
11 integrated in it is that term sheet which could be as a sub
12 rosa plan, but leaving that aside, is -- what's the point of
13 anybody voting? What are they voting on?

14 MR. SOUTHARD: Well, they're voting on whether they
15 want to accept the plan that presumably will contain these
16 terms.

17 THE COURT: But if they --

18 MR. SOUTHARD: But it's possible creditors could
19 reject the --

20 THE COURT: Yeah, but by that time, the estate would
21 have given up all its right to go after anybody because the
22 term sheet -- strike that. The order on the -- the final order
23 basically everybody has released everybody from everything,
24 which is probably the cost from the committee to get its deal
25 set. And it really is, should be contained in a plan.

1 This is what you filed as a liquidating claim or a
2 plan, because you even put the provision in that the committee
3 will have jurisdiction to bring the adversaries in other cases
4 if there are any, which it's going to have to do outside of
5 this because I think under the circuit decision, that would not
6 give them comfort to have the standing to bring those cases
7 unless it's a separate order, a specific order by the Court.

8 So we're going to have that anyway. So that --
9 that's my concern. I'm fully comfortable that you guys are
10 capable of figuring out who you want to release and who you
11 have claims against and who you don't. That was important to
12 me when we started. You guys had time, that's what you think,
13 that's what you think.

14 But my fear is signing this order I'm not as sanguine
15 as you are that this doesn't violate the Supreme Court decision
16 in Jevick.

17 MR. SOUTHARD: Well, Your Honor, I understand that
18 view. I think what -- as I understand the constructs
19 negotiated admittedly between the creditor parties, the --
20 there is not an intention to jump priority and do in effect a
21 carve-out.

22 THE COURT: No, there is, that's the whole plan.

23 MR. SOUTHARD: Well it's --

24 THE COURT: Is taking from the secured creditor,
25 which is permissible if you're not interfering with anybody

1 else.

2 MR. SOUTHARD: Insofar as there is an intention to
3 pay priority claims in full. And the parties -- part of that
4 stipulation is that in essence, the secured and the unsecured
5 share the responsibility for priority claims 50/50.

6 THE COURT: Well, if you made clear, that's an
7 interesting way to look at it, if you made clear that whomever
8 secured plus unsecured, whomever wants to, is obligated before
9 receiving any of its money, well, it wouldn't go unsecured, to
10 pay in full all allowed junior claim -- senior claims. You've
11 got some definitional work to do there. Then I think you're
12 probably okay. Because I think that's -- the Court went beyond
13 saying that you can't encumber, you can't skip people period.
14 And it's a lot broader than that, but.

15 So I think if the term sheet were clearer and
16 provided that if there are, I'm not saying there are, classes
17 or a class of folks other than the secured, because the secured
18 is willing to subordinate its position, they will be paid in
19 full or in a manner acceptable to them, then it's probably
20 okay. I mean, I haven't read what you write, but then that
21 would probably be okay to me.

22 MR. SOUTHARD: Your Honor, I think that the intention
23 was as you suggest, in that some for the avoidance of doubt
24 kind of language could certainly be added, but I don't want to
25 take away the opportunity for the creditors to state their

1 views as well.

2 THE COURT: Because that would cover -- then the
3 administrative creditors would have to also agree.

4 MR. FRIEDMAN: I'm sorry, Your Honor, so that we're
5 clear on the record, the anticipation, the intention of both
6 the order and the term sheet with all the administrative
7 (indiscernible) and all the priority, that those claims would
8 be paid --

9 THE COURT: So it's solely a bilateral deal between
10 the secured creditors and the committee. Make that clear, I'm
11 okay with that.

12 MR. FRIEDMAN: We'll work on some language and
13 clarify it in the (indiscernible) and if it's acceptable, we
14 can file (indiscernible).

15 THE COURT: Nobody has any indemnification rights in
16 this case, do they?

17 MR. SOUTHARD: I'm trying to wrap my brain to think,
18 Your Honor, if there's any party that might claim an
19 indemnification, but I guess --

20 THE COURT: That's why I asked.

21 MR. SOUTHARD: -- theoretically --

22 MR. KLEINBERG: The Board does.

23 THE COURT: Excuse me?

24 MR. KLEINBERG: The Board members do have rights of
25 indemnification under the prepetition bylaws.

1 THE COURT: Have they filed claims?

2 MR. KLEINBERG: They have.

3 THE COURT: Huh?

4 MR. KLEINBERG: They have, yes.

5 THE COURT: Nobody knows how much that is.

6 MR. KLEINBERG: Well, they filed their claims --
7 there's no claims -- causes of action certainly, nothing's been
8 ever asserted against the board members, so the claims on file,
9 I filed them as unliquidated contingent claims in order to meet
10 the bar date, that's all.

11 THE COURT: And they would be what class to you?

12 MR. KLEINBERG: They would be general unsecured
13 creditors.

14 THE COURT: So this would not impact your client
15 negatively, clients?

16 MR. KLEINBERG: No, as to the extent that the term
17 sheet provides a potential pot of assets, pot of cash for the
18 unsecured creditors it's favorable.

19 THE COURT: No, there's no 506, there's nothing
20 hidden any place so that you're willing to agree, because
21 they're asking you to do this today, that if your clients do
22 have indemnification rights and exercise them as claims, they
23 would merely be part of the general unsecured creditor body.

24 MR. KLEINBERG: That's correct. There's -- the board
25 is not a signatory to the term sheet, we were not involved in

1 negotiating it, I don't believe it has any direct or even
2 indirect effect on our rights other than creating a pot of
3 assets.

4 THE COURT: All right. I just want to make sure of
5 that. Okay. There are things that bother me. Not enough
6 because they can't get solved, so you learn to live with what
7 you have.

8 You guys work out this language and I'll grant the
9 motion.

10 MR. SOUTHARD: Thank you, Your Honor.

11 MR. KLEINBERG: Thank you, Your Honor.

12 THE COURT: That's because everybody has agreed and
13 the class action folks, the board members, or the board is
14 represented by Mr. Kleinberg, have all voiced to the Court that
15 this settlement, if I call it a settlement, doesn't create any
16 impediments to them.

17 So your release of the prepetition secured lenders,
18 your agreements that the collateral and their liens are in full
19 force and effect, the case has been around long enough, you
20 guys -- that's your decision. I'm not going to make you
21 litigate something. But a plan is ultimately going to have to
22 be filed, especially if this is a not for profit.

23 MR. SOUTHARD: Yes, Your Honor.

24 THE COURT: You have to work the case and if anything
25 in that plan, if I'm required to alter in any way the terms of

1 this deal in that plan, we're going to have to relook at this.
2 So I'll give you comfort and I'll sign an order, but I haven't
3 seen a plan yet and this is as close to a sub rosa plan as you
4 can get. But nobody's objecting to that either. And when I
5 have good lawyers and a lot of them, I let them make decisions,
6 but you've got to learn to live with them too.

7 So we'll grant the motion, redo the form of the order
8 and the term sheet I assume, submit it and we'll get it signed.

9 MR. SOUTHARD: Thank you, Your Honor. Just in terms
10 of mechanics, we have authority to use cash collateral and
11 borrow funds through the end of this week.

12 THE COURT: There's also something in this where I'm
13 lifting the stay to go after some monies being held. I read
14 that and I kind of wonder what that means. Is there any -- is
15 there a pot of money now that somebody wants meaning the
16 secured creditors and I'm now allowing them to take it?

17 MR. SOUTHARD: No, Your Honor, I think you're
18 referring to paragraph 17 of the order that is entitled held
19 funds.

20 THE COURT: Okay.

21 MR. SOUTHARD: The automatic stay of Section 362 of
22 the Bankruptcy Code is hereby vacated and modified insofar as
23 necessary to --

24 THE COURT: What does that mean?

25 MR. SOUTHARD: Your Honor, I believe this has to do

1 with the creditors ability to allocate and pay from collected
2 funds, make new loans from collected funds. I believe this was
3 UMB's language and I forget off the top of my head precisely
4 what it was dealing with.

5 THE COURT: Is this one where you're going to pay
6 yourself interest out of the cash collateral and then loan it
7 back to the debtor, which you all told me you weren't going to
8 be doing?

9 MR. HAMMEL: Good afternoon, Your Honor, Ian Hammel
10 on behalf of UMB. At the beginning of the case, Your Honor,
11 the indentured trustee was holding some reserve funds that had
12 been established back during the original bond issuances, and
13 that was -- those were funds that were held in trust and this
14 language was simply intended to permit the indentured trustee
15 to --

16 THE COURT: These are funds that have been held in
17 trust?

18 MR. HAMMEL: Yes, Your Honor.

19 THE COURT: So they're not property of the estate?

20 MR. HAMMEL: That's been our position, Your Honor.

21 THE COURT: Okay.

22 MR. HAMMEL: Thank you, Your Honor.

23 THE COURT: But we're not -- no money is being loaned
24 as part of this DIP for the purpose of paying your interest.
25 In other words, you're not charging the debtor to borrow money

1 to pay yourselves?

2 MR. HAMMEL: Your Honor, with respect to the funds
3 coming from UMB, no, we are not charging interest. I defer to
4 Mr. McCord.

5 THE COURT: Because everybody told us they weren't
6 going to do that. All right. Okay.

7 MR. SOUTHARD: So, Your Honor, I was going to just
8 make the point that we had until -- we have authority through
9 the end of this week. We would be submitting a -- agreeing on
10 a budget among the parties in interest here, and the mechanism
11 under the proposed final DIP permits the debtor to use cash
12 collateral going forward under the terms of an approved budget,
13 and that amendments to that approved budget can be made without
14 further order of the Court, but requiring the consent of the
15 DIP lenders, the committee and in consultation with the U.S.
16 Trustee.

17 So to that end, we would be agreeing on a budget this
18 week and then ultimately living under that budget.

19 THE COURT: The order that you presented, that you
20 all agree on once I sign it, the secured creditors can do
21 basically an awful lot to you all, so if that's what you want.
22 I mean, there's no active business anymore.

23 MR. SOUTHARD: There is not.

24 THE COURT: The debtor is operating for the purpose
25 of liquidating the secured creditor's assets.

1 MR. SOUTHARD: Correct.

2 THE COURT: This committee may or may not have causes
3 of action against folks. Those are Section 5 claims, that
4 don't belong to the secured creditor, I don't think, or do
5 they? No, they don't.

6 So the secured creditor is looking to get rid of the
7 hard assets, get its cash and go away. And then if there are
8 causes of action, we'll be left with a liquidating trust or
9 whatever we call it to litigate and you have to file a plan.
10 The term sheet says you have to be out of here by December 31.

11 MR. SOUTHARD: It does.

12 THE COURT: I don't know what happens if you're not.
13 I don't know what anybody's going to do.

14 MR. SOUTHARD: I think --

15 THE COURT: But clearly Brookhaven is not going to be
16 sold by December 31.

17 MR. SOUTHARD: I think there's a technical default,
18 Your Honor, and then we'll have a discussion would be the net
19 effect but yes.

20 THE COURT: But you know going in, you're never going
21 to cut a deal to rezone or whatever this is by 12/31.

22 MR. SOUTHARD: I wouldn't say that it's theoretically
23 impossible, Your Honor, but I do --

24 THE COURT: You haven't sold Oakdale yet and it's
25 been sitting there.

1 MR. SOUTHARD: We do have that as a track record.

2 THE COURT: I mean it's not easy, it's -- who knows
3 what the world is going to do. All right, guys, that's where
4 we are.

5 MR. SOUTHARD: Thank you very much for your time,
6 Your Honor.

7 THE COURT: Thank you.

8 UNIDENTIFIED: Your Honor, is there an adjournment?

9 MR. SOUTHARD: The Court hasn't given us an adjourn
10 date, but we can talk to chambers if Your Honor desires.

11 THE COURT: For what?

12 MR. SOUTHARD: For the Perkins loan motion as well as
13 the Stonybrook --

14 THE COURT: Talk to the government, see if you guys
15 can figure out some easier way to resolve this. If people are
16 capable of doing that. I mean, structurally capable of doing
17 that. If not, we'll give you some schedule to brief it on.
18 Not an evidentiary hearing, it's just going to be a brief.

19 MR. SOUTHARD: Thank you, Your Honor.

20 MR. FRIEDMAN: Your Honor, for the Stonybrook lease
21 extension obligation motion (indiscernible).

22 THE COURT: What's the next date we have you guys?

23 MR. SOUTHARD: We don't have one presently, Your
24 Honor.

25 THE COURT: Starting -- I'm in -- we don't have

1 anything until the end of August from the last week in July.

2 MR. FREIDMAN: So we have to try and get in before
3 the last week of July.

4 THE COURT: Yeah, I don't think it's going to be
5 rocket science. If you can tee it up, I'll sign it.

6 MR. SOUTHARD: Yeah, we'll have something available
7 to be filed tomorrow, Your Honor, so.

8 THE COURT: This is just an extension of the existing
9 lease.

10 MR. SOUTHARD: Correct, Your Honor.

11 THE COURT: Do they want a court order?

12 MR. SOUTHARD: It's styled as an amendment and
13 extension of the prepetition lease.

14 THE COURT: Okay. I'm not -- the ordinary course
15 just extend the lease? Get me an order, I'll sign it, we don't
16 have to have a full blown exercise about this.

17 MR. SOUTHARD: Thank you, Your Honor. Should we look
18 for a hearing date, or we should do it on notice of
19 presentment?

20 THE COURT: Do that one on notice of presentment even
21 though I don't do that normally.

22 UNIDENTIFIED: Thank you, Your Honor.

23 MR. SOUTHARD: Appreciate it.

24 THE COURT: But there's no point in bringing you guys
25 back here for that.

1 MR. SOUTHARD: Thank you very much.

2 THE COURT: And I want the kids at Stonybrook to know
3 they have a place to live, so let's do it as quickly as we can.

4 MR. SOUTHARD: Very well, thank you very much, Your
5 Honor.

6 THE COURT: All right. Thank you all. Thanks for
7 the work.

8 (Proceedings concluded at 2:27 p.m.)

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CERTIFICATE

I, Sheila G. Orms, certify that the foregoing is a true and accurate transcript from the official electronic sound recording.

Sheila Orms

Digitally signed by Sheila Orms
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SHEILA ORMS, APPROVED TRANSCRIBER

DATED: October 29, 2017

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